

**ROSSMANN AND MOORE, LLP**

*Attorneys at Law*

380 HAYES STREET, SUITE ONE  
SAN FRANCISCO, CALIFORNIA 94102 USA  
TEL (01)(415) 861-1401 FAX (01)(415) 861-1822  
www.landwater.com

**ROGER B. MOORE**  
ADMITTED IN CALIFORNIA  
rbm@landwater.com

**ANTONIO ROSSMANN**  
ADMITTED IN CALIFORNIA  
NEW YORK AND  
THE DISTRICT OF COLUMBIA  
ar@landwater.com

**JENNIFER L. SEIDENBERG**  
ADMITTED IN CALIFORNIA  
js@landwater.com

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*Via email and U.S. mail*

Russ Kanz  
Division of Water Rights, California State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

**RE: Butte County's Comments on the Matter of Water Quality Certification for the Department of Water Resources Oroville Facilities (Federal Energy Regulatory Commission Project No. 2100)**

Dear Mr. Kanz:

This letter provides Butte County's (Butte's) comments on the State Board's January 21, 2010 draft water quality certification ("2010 draft certification"), which addresses the Department of Water Resources' (DWR's) application to the Federal Energy Regulatory Commission (FERC) for a new license to operate the Oroville Facilities ("Oroville project," FERC Project 2100). On July 29, 2009, Butte County submitted detailed comments on the State Board's then-current draft, prior to DWR's withdrawal and resubmission of its application for water quality certification. Butte County's July 29, 2009 comment letter and its accompanying exhibits are appended to these comments, and are incorporated here as part of Butte's submission on the current draft. The great majority of Butte's earlier comments are equally applicable to the 2010 draft certification.

**I. Summary and Overview**

Once again, Butte concurs in the State Board's conclusion that "certain measures as written" in the March 2006 Settlement Agreement are "either not enforceable, will not fully protect the beneficial uses, or will not meet water quality standards in a timely manner." (Draft certification, p. 4.) Butte strongly opposes any attempt by DWR to weaken the State Board's conditions of certification. As the Board aptly noted, "[b]eneficial uses currently impacted by the project may not be reasonably protected if the proposed measure has a management plan with unclear or unenforceable standards, an excessively long period prior to implementation, or unspecified implementation dates." (Draft certification, p. 4.)

With that credit given, Butte is dismayed to discover that the State Board has failed to address

key concerns addressed in its July 29, 2009 submission in its 2010 draft certification, as well as its accompanying findings and mitigation measures. In some important respects described below, the current draft conditions are weaker than the ones they replaced, expanding the Board’s discretionary authority to reject certain conditions, and allowing “authorization by inaction” to weaken certain water quality protections. The State Board has thus far failed to fully heed its own advice, proposing unclear or unenforceable schedules, excessive periods prior to implementation, and vague implementation dates.

Moreover, for reasons articulated in Butte’s earlier letter that remain applicable here, three systemic problems left unaddressed in the 2010 draft certification—failure to analyze project operation in the context of climate change, failure to analyze the project in the context of other State Water Project (SWP) operations, and failure to adequately address the accumulation of toxic substances (notably methyl mercury and polychlorinated biphenyl (PCBs)—continue to undermine the State Board’s supporting environmental review, and prevent the State Board from rendering a lawful finding under section 401 that the project protects all beneficial uses and complies with all the mandatory objectives in the in the Water Quality Control Plan for the Central Valley-Sacramento and San Joaquin River Basins (Basin Plan). Notwithstanding any general desire the State Board may have to achieve speedy implementation of certification conditions, the State Board remains bound to fully enforce section 401 of the Clean Water Act, and thereby fulfill the Congressional mandate “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C. § 1251(a).)

## **II. The State Board cannot waive or defer its Clean Water Act enforcement obligations.**

Under the enforcement regime Congress established in the Clean Water Act, it is the State Board’s duty under section 401 of the Clean Water Act (33 U.S.C. §1341) to fully enforce water quality standards and implementation plans promulgated by the State Board. (33 U.S.C. § 1313.) DWR must also demonstrate compliance with the State Board-approved objectives in the Basin Plan. Though called “objectives,” compliance with these standards and their implementation program is mandatory. (*See State Water Res. Control Bd. v. Office of Admin. Law* (1993) 12 Cal. App. 4th 697, 701-02.) The Basin Plan standards also apply to the entirety of project operations. (*PUD No. 1 v. Wash. Dep’t of Ecology* (1994) 511 U.S. 700, 711-12.)

The Board has correctly noted that to issue a section 401 certification, DWR must demonstrate to the Board that DWR will achieve

compliance with all water quality objectives in the Basin Plan... as well as with other water quality objectives that the Project may affect. DWR must also demonstrate that the Project does not impair the beneficial uses of the Feather River or Lake Oroville. If the Project does not comply with one or more of the water quality objectives, then DWR must describe the actions that it will take to bring its Project into compliance with the applicable water quality requirements in order to protect and maintain the beneficial uses.

Exhibit 1 to Butte’s July 29, 2009 letter (Ex. 1), pp. 1-2.

### **III. The 2010 Draft Certification weakens public accountability over enforcement of water quality conditions.**

#### **A. The 2010 Draft Certification allows the Deputy Director additional discretion to avoid standard minimum flow and temperature requirements.**

While most of the 2010 certification conditions remain the same as in the draft Butte addressed last year, several key conditions are weakened by allowing the Deputy Director, Division of Water Rights further discretion to avoid what had been more straightforward conditions of approval. For example:

- Section S8(b) gives the licensee an additional opportunity to persuade the Deputy Director that it “cannot feasibly meet” the water temperature requirements for the Low Flow Channel in Table S8 using “current facilities.”
- Section S8(c) weakens the earlier requirement of facilities modification plans by giving the Deputy Director further discretion to approve facility modifications, determine that it is not “feasible” to meet Table S8, or authorize the licensee to “comply with alternate temperature requirements.” Section S8(f), which addresses minimum flow and temperature requirements in the High Flow Channel, qualifies the requirement that the licensee shall operate the project to protect cold beneficial use by adding the term “to the extent reasonably feasible.” It would apparently not require the applicant to show that compliance is impossible or unreasonable.

Without effective enforcement of minimum flow and temperature requirements, the conditions of approval cannot assure compliance with the Basin Plan, and cannot lawfully support section 401 certification. The net effect of these changes, which elevate the Deputy Director’s discretion to relax the applicable standards, will be to inject additional uncertainty into the ability of the certification conditions to enforce the referenced minimum flow and temperature requirements. That uncertainty thwarts the present draft’s ability to certify compliance with Clean Water Act and Basin Plan standards.

#### **B. The 2010 Draft Certification allows the Deputy Director to “approve” the licensee’s requests by inaction.**

In numerous certification conditions, the 2010 Draft Certification allows the Deputy Director to automatically “approve” the licensee’s requests by inaction, even where no determination has been made on the merits of the request. For example:

- Section S8(b), addressing “interim operations plans” submitted by licensees claiming they cannot “feasibly meet” the Table S(b) temperatures for the Low Flow Channel, provides that “[i]f, within 90 days, the Deputy Director does not either act on the request for approval or identify the need for additional information or actions, the shall be deemed approved.”
- Numerous other provisions have also been revised to allow for similar or identical approvals by inaction. These include, to name several, section S8(c) (facility modification and operations plan), S8(f) (interim plan to protect cold beneficial use), section S8(g) (strategic plans in conference years), S10(a) (warm water fishery habitat plan), S12(b), (c) (water quality monitoring), S13(e) (public health plan at North Forebay recreation area), S15(c) (wildlife area management plan), S19 (protection of Elderberry Longhorn Beetle).

The public accountability of these provisions, whose enforcement is crucial to achieving effective water quality protection under section 401, would also be weakened by the prospect that the Deputy Director could approve changes by fiat. In a time of budget and time pressures, the mechanism of “approval by inaction” could significantly diminish water quality enforcement, because it would provide the Deputy Director an “easy out” to render approvals without investing heavily in resources, making determinations on the merits, or answering to the public.

**C. The 2010 Draft Certification weakens the timing requirements in some conditions of approval.**

In some cases, the 2010 conditions propose time conditions that appear to be less stringent than their predecessors. For example, in the condition addressing the fish weir program, section S5(e) allows the Phase 2 plan to be filed in eight years instead of five; section 5(g) allows installation in twelve years instead of six. In the condition addressing the Feather River Fish Hatchery, Table S7A’s required temperatures come ten years later rather than “upon license issuance.”

**IV. The 2010 Draft Certification is fatally deficient, because the State Board has evaded assessment of climate change and water quality.**

Despite extensive discussion in Butte’s July 29, 2009 comments, the 2010 Draft Certification (including the findings and mitigation) have failed entirely to account for the consequences of climate change for project-related water quality issues. Oroville, as the SWP’s primary storage and power generation facility, plays a central role in SWP operations. Changing climatic conditions will impact Oroville’s flood control, reservoir storage levels, upstream and downstream flow levels, water temperatures, power generation, water quality, fisheries, and recreation. These wide-ranging impacts make it untenable to finesse climate change simply by focusing on reactive conditions of approval. Simply stated, without analysis of project operations in the context of a changing climate, the State Board will lack the foundation to conclude that the project will not impair the beneficial uses of the Feather River and Lake Oroville. Climate change assessment is therefore not simply a CEQA issue; it is central to whether section 401 water quality certification can occur.

DWR’s Oroville Project EIR evades analysis of climate change, particularly in its relationship to water quality. DWR’s DEIR contains very little discussion of the water quality consequences of operating the project in the context of a changing climate. Indeed, its water quality impacts discussion is almost entirely predicated upon modeling exercises that assumed the *non-existence* of climate change. See DEIR pp. 5.2-11 to 5.2-12, App. E at 49.

DWR’s Oroville Final EIR evades the issue again, relying upon excuses that are strikingly similar to those DWR and the Attorney General have justly criticized in other settings. For example:

- Rather than recognizing that hydrologic variability is likely to increase in the future, as its own studies have consistently shown, DWR presumes that hydrologic variability *from the previous century* “is expected to continue in the foreseeable future.” (FEIR, p. 3-28.)
- Rather than drawing on the analytical and modeling techniques that DWR has employed in other reports on climate change, including reports addressing the Feather River watershed, DWR summarily concludes that “any discussion of potential changes to operation of the

Oroville Facilities necessitated by climate change *would be speculative* at this time.” (*Id.* (emphasis added).)

- The FEIR suggests that there would be “further opportunities in the future, at the next relicensing period” to “make more definitive statements about the extent of climate change.” (FEIR, p. 3-27.) The “next relicensing period” referenced here would take place thirty to fifty years after project implementation.

Despite its awareness of the paucity of project-related climate change analysis, the State Board’s draft water quality certification *still* does not address climate change. Rather, the certification only relies upon DWR’s EIR, whose attempted deflection of serious climate change assessment to future generations infected all key elements of the Final EIR, including assessment of the environmental setting, direct and cumulative impacts, feasible alternatives, and mitigation. Due to this error, the assessment of water quality impacts is predicated upon a hypothetical future that DWR knows to be dangerously false. Without correction, that fatal omission prevents a finding under section 401 that the project meets water quality standards and protects beneficial uses.

#### **V. The 2010 Draft Certification still lacks a thorough assessment of the Oroville project in the context of a changing State Water Project.**

The Oroville project is an integral and interconnected part of the State Water Project. (Wat. Code, § 12934(d). ) Releases from Lake Oroville must serve a variety of purposes, including (1) compliance with Bay-Delta water quality standards; (2) satisfaction of obligations under environmental laws such as the Clean Water Act and federal and state Endangered Species Acts; and (3) release of water, as available, to meet the needs of State Water Project contractors. (*See* DEIR at p. 2-5.)

Operation of the Oroville project is closely tied to downstream needs. If those downstream constraints change, or if DWR discovers that operational changes are necessary to meet existing constraints or comply with legal requirements, changes to the Lake Oroville release schedule are likely to follow. Fundamental change in statewide operations appear to be increasingly likely. (See, e.g., *Natural Resources Defense Council v. Kempthorne* (E.D. Cal. 2007) 2007 U.S. Dist. Ct. LEXIS 42263, 91968; *Pacific Coast Federation of Fishermen’s Associations v. Gutierrez* (E.D. Cal. 2008) 2008 U.S. Dist. LEXIS 31462); E. HANAK, MYTHS OF CALIFORNIA WATER—IMPLICATIONS AND REALITY 23 (Public Policy Institute of California (2009) (DWR’s own data suggest that Delta smelt restrictions alone are likely to reduce Delta exports by an average of twenty to thirty percent).

At present, 2010 shows signs of becoming an extremely dynamic year for State Water Project operations, with correspondingly major implications for the future of Oroville operations. As just a few additional illustrations:

- On February 1, 2010, DWR certified the Final EIR for the post-Monterey Amendments restructuring of the State Water Project, anticipated for almost a decade since *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892. (See [http://www.water.ca.gov/environmentalservices/monterey\\_plus.cfm](http://www.water.ca.gov/environmentalservices/monterey_plus.cfm).)
- A February 11, 2010 federal court ruling enforced pumping restrictions to assist Delta smelt. See [http://www.recordnet.com/apps/pbcs.dll/article?AID=/20100211/A\\_NEWS/2110325](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20100211/A_NEWS/2110325).
- On March 15, 2010, the National Academy of Sciences is expected to issue its first report on

two biological opinions (of the Fish and Wildlife Service and NMFS, respectively) affecting both State Water Project and the Central Valley Project's respective water operations. (See <http://www8.nationalacademies.org/cp/projectview.aspx?key=49175>.)

In its July 29, 2009 comments, Butte reminded the State Board that in its comments on the Oroville DEIR, the State Board faulted the DEIR for failing to “include an adequate discussion of the impact of State Water Project (SWP) operations on the Proposed Project.” (FEIR, p. 4-41.) The State Board observed then that changes to the timing or quality of water deliveries could affect the ability of the Lake Oroville coldwater pool to protect anadromous fish, and the extent of the project's cumulative impacts. (FEIR, p. 4-41.) Unfortunately, rather than continuing to press for that robust analysis, the 2009 and 2010 iterations of the draft water quality certification appear closer to the evasive generalization that DWR used to respond to the State Board's comments on the DEIR; namely, that “[a]nalysis of future changes to State Water Project (SWP) statewide operations is outside the scope of the EIR.” (FEIR, p. 4-51.) Thus, even though Oroville Reservoir is the State Water Project's most prominent storage facility, the draft certification appears to operate on the premise that the operation of Oroville facilities can be segregated from SWP operation. The surest sign that this attempted segregation fails is by reference to section S8(e) of the 2010 Draft Conditions. In pertinent part, section S8(e) provides:

If the If the April 1 runoff forecast in a given water-year indicates that Oroville Reservoir will be drawn to elevation 733 feet (approximately 1,500,000 acre-feet) under normal operation of the Project, then the minimum flows in the HFC may be reduced on a monthly average basis, in the same proportion as the respective monthly deficiencies imposed upon State Water Project deliveries to the State Water Contractors for agricultural use; however, in no case shall the minimum flow releases be reduced by more than 25 percent.

Despite some rearranged clauses, this section is effectively the same as former draft section S8(d), the version that Butte and the California Sportfishing Protection Alliance (CSPA) criticized last July. As with the former version, the “normal operation” of the project in section S8(e) remains fundamentally ambiguous. In light of such recent developments the Delta species decline, enforcement of endangered species law, and the onset of climate change, considerable controversy exists over whether the “new” normal or some older version should prevail. When NMFS issues its final Biological Opinion for the Oroville Project, the restrictions on DWR may remain in the same place, or may become more or less stringent than they are today (as advocated, respectively, by CSPA and DWR).

Each of these outcomes would bring different terms to Oroville operation, with potentially different implications for water quality. In the face of this continuing uncertainty over what is “normal,” final certification under section 401 would be premature. As the entity legally responsible for ensuring that section 401's standards are met prior to issuing its final certification, the State Board cannot leave it to NMFS or any other entity to ensure that Lake Oroville's coldwater pool is protected, and all cumulative impacts the project in the context of SWP operations are addressed.

The State Board may deny without prejudice applications with “some procedural inadequacy (e.g., failure to provide a complete fee or to meet CEQA requirements)”. (23 Cal. Code Regs., § 3837(b); see also 23 Cal. Code Regs., § 3836 (where “the federal period for certification will expire before the certifying agency can receive and properly review the necessary environmental

documentation?); *Clean Water Act section 401 Water Quality Standards Certification for Tract Map 30921, City of Moreno Valley, Riverside County* (Regional Water Quality Control Board, Santa Ana Region, June 10, 2008) (earlier application “was denied without prejudice pending resolution of inconsistencies and omissions” in environmental document prepared for CEQA compliance.) Here, the State Board should take the time to develop a clearer understanding about how State Water Project operations will impact Oroville water quality issues.

**VI. The 2010 Draft Certification fails to provide assurance that approach to problems stemming from methyl mercury, PCBs and other contaminants will meet water quality standards and the requirements of the Basin Plan.**

**A. The 2010 Draft Certification fails to protect the public from PCBs and other contaminants.**

Butte’s earlier comments discussed the crucial need for additional steps to provide reasonable assurance that DWR’s approach to problems stemming from methyl mercury, PCBs and other contaminants will meet water quality standards. As those comments explained in detail, DWR’s own technical documents supporting its Oroville EIR confirm that Basin Plan standards have not been met. The 2010 draft conditions fail to provide that assurance as well, and notably fail to address any of Butte’s analysis relating to PCBs. The conditions that are present do not adequately address the major public health problems involved, and add questionable new conditions and contingencies.

**B. The Comprehensive Water Quality Monitoring Program fails to ensure Basin Plan compliance and protect public health.**

In section 12(n), the addition of the term “conduct studies and, if appropriate” weakens the Deputy Director’s responsibility to manage methyl mercury and delays implementation of methyl mercury containment/management. This condition implies that methyl mercury contamination is not an serious issue, and that studies need to be undertaken to evaluate if methyl mercury is a problem before managing it, and only if *appropriate*. No time frame is specified for these referenced studies; “appropriate” is also not defined. In Section 12(n), the fourth line, “the plan would incorporate...approval or modification” has been changed to “the Deputy Director...shall be deemed approved.” On the whole, the new language appears more vague than what was generally described in the previous draft certification document.

**C. The Pathogen Public Health Protection Program fails to ensure Basin Plan compliance and protect public health.**

In section 13(e), “study” is changed to “schedule.” This indeterminately extends the amount of time before risks are evaluated, and there are no time frame or content specifics for the schedule (i.e., when the schedule takes place, what will be scheduled, and if the schedule must include an evaluation study).

**D. The public education program fails to protect against risks of fish consumption.**

In Section 14 (a), the term “protect” is changed to “advise.” The Deputy Director’s

responsibility is reduced to merely advising ,and not protecting the public from consumption of contaminated fish. As revised, the condition would focus on education about the risks associated with consumption of contaminated fish.

**VII. Conclusion**

For the foregoing reasons, Butte urges the State Board not to grant DWR its requested certification on the present application. Should the Board move forward with that certification despite this recommendation, the proposed conditions should not be weakened, and Butte’s further suggestions outlined here should be incorporated.

Respectfully submitted,

/s./

Roger B. Moore  
Counsel to Butte County